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No. 85-406

In The

Supreme Court of the United States

October Term, 1985

GEORGE R. ARIYOSHI, GOVERNOR,
STATE OF HAWAII, et al.,

Petitioners,

vs.

SELWYN A. ROBINSON, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Have the federal courts jurisdiction to hear federal constitutional claims where a state supreme court refuses to hear argument or allow evidence on federal claims which claims are first raised in a petition for rehearing after the court, overruling one hundred years of law to the contrary, *sua sponte* divests plaintiffs of their adjudicated right to own and divert water for irrigation?

II

Was there a "full and fair hearing" for *res judicata* or jurisdictional purposes on plaintiffs' federal claims when the state supreme court refused to grant plaintiffs' petition for rehearing on said federal claims which accrued for the first time when the court decided *sua sponte* that the judgment affirmed by the United States Court of Appeals awarding plaintiffs the ownership and right to divert water was invalid?

III

Is there a justiciable case or controversy where plaintiffs have been adjudged by territorial and federal courts to own and have the right to divert "normal surplus waters" from a watershed and defendant state officials maintain that they have the right and duty to enforce a later state supreme court holding that there is no such thing as "normal surplus water", that the prior judgment is invalid and that plaintiffs have no right to divert water?

IDENTIFICATION OF RESPONDENTS, PLAINTIFFS BELOW

This brief is submitted in opposition to the Petition for a Writ of Certiorari on behalf of Plaintiffs below and Respondents before this Court: the Estate of Selwyn A. Robinson, deceased, Eleanor Robinson, Russell S. Robinson, Ruth R. LeFiell, Bruce B. Robinson, Keith P. Robinson, the Trustees under the Will of Aylmer F. Robinson and Helen M. Robinson, Individually and as Executrix of the Estate of Lester B. Robinson.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
IDENTIFICATION OF RESPONDENTS, PLAINTIFFS BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
ARGUMENT	10
I. The Hawaii Supreme Court's *sua sponte* holding that the Robinsons' previously adjudicated ownership and right to divert normal surplus water of the Hanapepe River did not exist, that all water in the river belonged to the State and that no water could be diverted from the watershed was a violation of due process	10
II. Respondents were entitled to a full and fair hearing on their federal constitutional claims	13
III. The District Court had jurisdiction to enter a declaratory judgment to protect Plaintiffs' adjudicated ownership of water rights	16
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES:

Allen v. McCurry, 449 U.S. 90, 95 (1980) 16

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 680 (1930) 11

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 13, 16

Gibson v. Berryhill, 411 U.S. 564 (1973) 15, 20

Haring v. Prosise, 462 U.S. 306 (1983) 13, 16

Hughes v. Washington, 389 U.S. 290 (1967) 11

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) 16

McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 504 P.2d 1330 (1973), reh'g. denied. 55 Hawaii 260, 517 P.2d 26, appeals dismissed and cert. denied, 417 U.S. 962, 976 ..... *passim*

Muhlker v. New York and Harlem Railroad Co., 197 U.S. 54 (1905) 11

Nevada v. United States, 463 U.S. 110, 103 S.Ct. 2906 (1983) 21

O'Neil v. Northern Colorado Irrigation Co., 242 U.S. 20, 26 (1916) 12

Reppun v. Board of Water Supply, 65 Hawaii 531, 656 P.2d 57 (1982) 21

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 13, 15, 16

Stefel v. Thompson, 415 U.S. 452, 463 (1974) 17, 20

Territory v. Gay, 31 Hawaii 376 (1930) aff'd, 52 F.2d 356 (9th Cir.), *cert. denied*, 284 U.S. 677 (1931) ..... *passim*

Territory v. Gay, 25 Hawaii 651 (1920), 26 Hawaii 382 (1922) 3

TABLE OF AUTHORITIES--Continued

Page

STATUTES:

28 U.S.C. Section 1331 2
28 U.S.C. Section 1343 2
28 U.S.C. Section 2201 ..... 2, 20
28 U.S.C. Section 2283 2
42 U.S.C. Section 1983 ..... 2, 20
Hawaii Rev. Stat. Section 7-1 ..... 5, 8, 12

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OPINIONS BELOW

The opinion of the District Court for the District of Hawaii (Petitioners' Appendix C) is reported at 441 F. Supp. 559 (D. Hawaii 1977). The opinion of the United States Court of Appeals for the Ninth Circuit (Petitioners' Appendix A) is reported at 753 F.2d 1468 (9th Cir. 1985). The opinion of the Supreme Court of the State of Hawaii on certified questions from the United States Court of Appeals for the Ninth Circuit is reported at 65 Hawaii 641, 658 P.2d 287 (1982).

STATEMENT OF THE CASE

Respondent-Plaintiffs Robinson brought this action under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343, 2201 and 2283 for an injunction and declaratory judgment to prevent Petitioner State Officials from interfering with Plaintiffs' vested ownership and right to divert the "normal surplus water"[1] of the Hanapepe River on the Island of Kauai. Respondents McBryde Sugar Co., Ltd., Olokele Sugar Co., Ltd., and Small Owners also own water rights in the Hanapepe River which were similarly threatened with taking by Petitioners.

Since 1891 the Robinsons, doing business as Gay and Robinson, and their lessees have diverted the normal surplus water out of the Hanapepe watershed to irrigate sugar cane on their land at Makaweli. The Robinsons own the lands known as the ilis[2] of Koula and Manauahi, upon which form the head waters of the Hanapepe River.

In 1928, the Territory of Hawaii sued to enjoin the diversion of the normal surplus water by the Robinsons and their lessee, Hawaiian Sugar Co., Ltd., from the Hanapepe watershed. The trial court, the Supreme Court of the Territory of Hawaii and the United States Court of Ap-

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[1] "The term 'normal surplus water' has the meaning given the term by *Territory v. Gay*, 31 Hawaii 376 (1930) aff'd, 52 F.2d 365 [sic] (9th Cir. 1931), *cert. denied*, 284 U.S. 671 [sic] (1931) and refers to all surplus water other than 'storm and freshet surplus waters,' which are not required for the satisfaction of 'prescriptive rights' or 'appurtenant rights.'" Judgment, May 2, 1978, U.S.D.C., App. 264a.

[2] An ili is a sub-division of land in Hawaii which may be part of or independent of an ahupuaa. An ahupuaa is a larger division of land usually running from the mountains to the ocean which may be subdivided into ilis. *Territory v. Gay*, 31 Hawaii at 380-81.

peals for the Ninth Circuit held that the Robinsons, as the owners of the ilis of Koula and Manauahi, were the owners of the normal surplus water of the Hanapepe River and therefore could divert said water for use outside the watershed of Hanapepe. *Territory v. Gay*, 31 Hawaii 376 (1930), *aff'd*, 52 F.2d 356 (9th Cir. 1931), *cert. denied*, 284 U.S. 677 (1931) (*Gay II*).

The Territory had previously attempted to gain title to the ili of Koula by filing an ejectment action against the Robinsons on the theory that the Territory of Hawaii as successor to the King was the owner of the ili of Koula and that the Robinsons' predecessor in title had been the grantee of only a small portion of Koula. The Supreme Court of Hawaii determined that the ili of Koula was independent of the ahupuaa of Hanapepe which was owned by the Territory and that the Robinsons owned all of Koula. *Territory v. Gay*, 25 Hawaii 651 (1920), 26 Hawaii 382 (1922) (*Gay I*).

The Territory was interested in obtaining title to Koula not because of the intrinsic value of its mountainous terrain but because it wanted the use of the enormous amount of water that collected upon it to form the Hanapepe River. The Territory, the owner of the ahupuaa of Hanapepe downstream of Koula, owned dry land that did not have appurtenant water rights. Having lost its claim of title to Koula and therefore its water, in *Gay I* the Territory then brought *Gay II* to enjoin the Robinsons' diversion of the water.

In *Gay II* the Territory advanced two theories. First, it claimed that as the successor to the King of Hawaii and the owner of the ahupuaa of Hanapepe it was superior in title and right to the owners of the ilis of Koula and Man-

auahi and therefore owned the surplus waters of the Hanapepe River. In the alternative, the Territory argued that riparian law should be adopted and that the water should be apportioned between the ilis and the ahupuaa of Hanapepe with most of the water going to the Territory. Both these claims were rejected.

In reliance on the availability of water as awarded in *Gay II*, Respondent Olokele Sugar Co., bought out Hawaiian Sugar Co., Ltd., and entered into a lease with the Robinsons for the purpose of conducting a sugar plantation at Makaweli. Olokele and Gay and Robinson expended close to a million dollars in developing and improving the tunnel and ditch system to transport the normal surplus water from the Hanapepe River to Makaweli. These improvements were completed in 1949.[3]

Respondent McBryde Sugar Co., owning sugar land to the east of the Hanapepe River and having acquired appurtenant water rights along the Hanapepe River through the purchase of ancient taro lands, claimed that the total water which it had previously obtained from the Hanapepe River had decreased because of the improvements in Gay and Robinson's diversion system. It brought suit in the Fifth Circuit Court against the Robinsons, Olokele Sugar Co. and the other land owners in the ahupuaa of Hanapepe having appurtenant water rights including the Territory of Hawaii to determine the water rights of all parties in the Hanapepe River.

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[3] Findings of Fact 19, 27 and 28, App. 82a, 84a and 85a. (Record reference to App. — , are to the Appendix filed by Petitioners, References to R.App. — are to the Appendix filed with this brief.)

> "The only issues of fact or law tried in *McBryde* in the Fifth Circuit Court were: (1) the identity and extent of the privately or publicly owned land having appurtenant water rights, and privately or publicly owned water rights owned separately from land, (2) the quantity of water attributable to the identified water rights, (3) McBryde's claim by adverse possession against the Robinsons to prescriptive water out of G&R's normal surplus water and the quantity of such prescriptive water, and, (4) the claims of the State, McBryde and plaintiffs to a division of the storm and freshet surplus."[4]

After a four-month trial in 1965, judgment was entered January 30, 1969. The Robinsons, McBryde and the State appealed the trial court's judgment on the last three issues. No party, including the State, contested Robinsons' ownership of the normal surplus water nor the right of any party to transport its water out of the watershed or use it on lands to which it was not appurtenant.[5]

On appeal, the Supreme Court of Hawaii, overruling 100 years of precedent, *sua sponte* held that King Kamehameha III had not conveyed surface water with the land which he granted to his chiefs in the Great Mahele of 1848. Therefore, the state owned all the surface water subject to appurtenant rights of native land owners for taro growing and domestic use. The court also held that the Enactment of Further Principles of 1850, Hawaii Revised Statutes (H.R.S.) §7-1[6], which guaranteed native tenants on the land the right to such things as firewood, house tim-

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4 Finding of Fact 7 (App. 77a)

5 Findings of Fact 3 and 4, App. 75a-76a.

6 App. 421a, 423a

ber, thatch, drinking water, running water, and rights of way which they had enjoyed prior to the Mahele, codified the riparian common law as construed by the Massachusetts and English courts. *McBryde Sugar Co. v. Robinson*, 54 Hawaii 174, 504 P.2d 1330 (1973) *reh'g. denied*, 55 Hawaii 260, 517 P.2d 26, *appeals dismissed* and *cert. denied*, 417 U.S. 962, 976 (1974).

Having adopted riparian law requiring the flow of water in the Hanapepe River to remain in its natural state without substantial dimunition, the Supreme Court of Hawaii destroyed plaintiffs' property rights by holding that there was no such thing as normal surplus water awarded them in *Gay II*[7], and denying any right to divert water out of the watershed.

The court summarized its holdings clearly and explicitly:

VIII Summary

> "1. As between the State and McBryde, and McBryde and Gay & Robinson, the State is the owner of the water flowing in the Koula Stream and Hanapepe River. However, the owners of land, having either or both riparian or appurtenant water rights, have the right to the use of the water, but no property in the water itself.
>
> 2. The State, McBryde and Gay & Robinson have both appurtenant and riparian rights to water in connection with land within the Hanapepe Valley. However, under claim of such rights, neither McBryde nor Gay & Robinson may transport water to another watershed.

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[7] "There can be no quantity of water which may be deemed normal daily surplus water and Gay and Robinson is entitled to nothing under the ruling of that case." App. 187a

3. Under the doctrine of riparian rights, owners of land adjoining a natural watercourse have the right to a flow of a river or stream in the shape and size given it by nature. Thus, under such right there can be no normal daily surplus water.

4. McBryde has no prescriptive right to water, as no one may claim title or interest against property owned by the State.

5. "Storm and freshet" water is the property of the State."

And the court concluded so that there could be no question about its ruling.

> "Neither McBryde nor Gay & Robinson has any right to divert water from the Koula Stream and Hanapepe River out of the Hanapepe Valley into other watersheds."[8]

Upon the rendering of this decision, it was clear that the Respondents' vested water rights had been destroyed. Although the Small Owners and Olokele Sugar Co. had not appealed, their rights having been determined to their satisfaction in the court below, the court held that they could not sell or transport their water. Without water Gay and Robinson, McBryde and Olokele would cease to exist as sugar plantations in their present form.[9]

Timely petitions for rehearing were filed by McBryde and the Robinsons and motions for partial vacation of opinion and or opportunity to present evidence and argument were filed by Olokele and the Small Owners. The petitions and motions for the first time presented federal constitutional claims; to wit that transformation of private prop-

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8 App. 187a-188a.

9 Findings of Fact 29, 32 App. 85a-86a.

erty into public property by judicial decree without compensation violated due process of law and that deprivation of property was effected without giving the parties the opportunity to present evidence and be heard as required by procedural due process.[10]

The Supreme Court of Hawaii refused to hear evidence or argument on the constitutional issues but entered an order limiting a rehearing to: "(1) the construction of HRS §7-1 and (2) the use of appurtenant water on lands other than to which the right is appurtenant."[11]

At oral argument, the issues continued to be so limited and no argument was allowed on the constitutional issues. Subsequently, a per curiam opinion was entered affirming its prior decision without explanation, two justices dissenting.[12] Justice Levinson wrote a long scholarly dissent setting forth the prior law in Hawaii as to water rights which was adopted by the United States District Court in its decision below.[13]

The Robinsons thereupon filed this action in the United States District Court and a Petition for Certiorari to this Court. The other Respondents appealed and petitioned for certiorari.

The Attorney General moved to dismiss the appeals to this court on the following grounds:

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10 Finding of Fact 8, App. 78a.

11 Finding of Fact 9, App. 78a.

12 Finding of Fact 11, App. 79a.

13 App. 63a, 114a.

(1) The Federal questions sought to be reviewed were neither timely nor properly raised nor expressly passed on by the courts of Hawaii.

(2) The Appeal does not present a substantial federal question.[14]

The appeals were dismissed for want of jurisdiction and the petitions for writ of certiorari denied. 417 U.S. 962, 976 (1974).

The United States District Court ruled in favor of Plaintiffs and other Respondents. It enjoined Defendant State Officials from their threatened interference with the Respondents' vested rights to divert, transport, sell or lease their water from the Hanapepe River subject to the right of the State to commence eminent domain proceedings.[15] On appeal, after certifying questions to the Supreme Court of Hawaii,[16] the United States Court of Appeals affirmed the declaration that the rights awarded in *Gay II* were vested. The Court of Appeals decided that a declaratory judgment was adequate relief and remanded the case for entry of a declaratory judgment declaring said water rights and maintaining jurisdiction in the District Court to enforce said rights if necessary.[17] The judgment on remand was entered on September 24, 1985.[18]

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14 Respondents' Appendix B, R.App. 9

15 App. 263a

16 65 Hawaii 641, 658 P2d 287 (1982)

17 153 F2d 1468, App. 1a

18 Respondents' Appendix A, R.App. 1

ARGUMENT

I. The Hawaii Supreme Court's Sua Sponte Holding That The Robinsons Previously Adjudicated Ownership And Right To Divert Normal Surplus Water Of The Hanapepe River Did Not Exist, That All Water In The River Belonged To The State And That No Water Could Be Diverted From The Watershed Was A Violation Of Due Process.

In *Gay II*, the Supreme Court of the Territory held that the Robinsons as owners of Koula and Manauahi were the owners of the normal surplus waters and rejected riparian law stating that the adoption of riparian law with respect to normal surplus would "alter established rights". 31 Hawaii at 396. The court further opined:

> "Water rights, it need hardly be added, have financial value. The legal possibility that some of the water may be wasted by an owner is no justification for depriving him of his right thereto without due compensation." 31 Hawaii at 401.

The judgment of the Supreme Court of the Territory of Hawaii was affirmed by the United States Court of Appeals for the Ninth Circuit, the territorial courts being subject to federal appellate review. 52 F2d 356. Certiorari was denied by this Court. 284 U.S. 677. Relying on this federal judgment, substantial sums were spent to improve the diversion ditches to transport the water from Koula to Makaweli.

McBryde's suit against all other parties having an interest in the waters of the Hanapepe River to determine the rights of various landowners to appurtenant, prescriptive and storm and freshet water concerned issues which had been expressly left open in *Gay II*. 31 Hawaii at 382,

404. In *McBryde* the State agreed that *Gay II* had adjudicated and was *res judicata* as to Plaintiffs' ownership of the normal surplus waters. Further, the State did not contest the right of any person owning water rights to divert its water out of the watershed. However, contrary to all rules of American and common law jurisprudence, the Supreme Court of Hawaii *sua sponte* reversed *Gay II* and 100 years of judicial decisions by holding that all the water in the streams of Hawaii belonged to the State, subject to the rights of landowners with appurtenant rights to use the water solely on their own land, and that no one, and specifically neither McBryde nor plaintiffs, had the right to divert water out of the watershed. As held by the District Court, such a ruling was a clear violation of due process.

The Supreme Court of Hawaii refused any hearing or argument on the issues of the constitutionality of its ruling. The court's decision was constitutionally invalid. *Muhlker v. New York and Harlem Railroad Co.*, 197 U.S. 544 (1905).

> "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government."
>
> *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 680 (1930).

Since the State had claimed neither ownership of the normal surplus water nor that water could not be diverted from the watershed, the decision of the Hawaii Court was even more unexpected than that of the Supreme Court of Washington in *Hughes v. Washington*, 389 U.S. 290 (1967). The Supreme Court of Hawaii held that the "normal surplus water" awarded to the Robinsons in *Gay II* did not exist. As Justice Stewart stated in his concurring opinion in *Hughes v. Washington*:

> "For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.
>
> 389 U.S. at 296-297
>
> * * *
>
> Although the State in this case made no attempt to take the accrued land by eminent doman it achieved the same result by effecting a retroactive transformation of private into public property without paying for the privilege of doing so. Because the due process clause of the 14th Amendment forbids such confiscation by a state no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate."
>
> 389 U.S. at 298

The Hawaii court's adoption of riparian law based upon the Principles of 1850[19] was "a perverse reading of the law . . . used as an excuse for giving a retrospective effect to the law" impliedly forbidden in *O'Neil v. Northern Colorado Irrigation Co.*, 242 U.S. 20, 26 (1916). The Court of Appeals correctly held that the State of Hawaii cannot declare by court decision that the Plaintiffs' vested property rights do not exist.

The correctness of the District Court's and Court of Appeals' rulings on the merits is so clear that it is not attacked by Petitioners. It is Petitioners' view, however, that the sixty-five years of litigation over the water in the Hanapepe River should continue while the Supreme Court of Hawaii and the legislature formulate a new sys-

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[19] HRS §7-1, App. 421a, 422a

tem of water law for Hawaii based upon state ownership and control of the water.

II. Respondents Were Entitled To A Full And Fair Hearing On Their Federal Constitutional Claims.

Petitioners rely on the cases of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) as standing for the proposition that a state supreme court without a hearing can divest property rights from a private citizen and award those property rights to the state without compensation and contrary to prior federal court adjudications, and the only redress a private citizen has is the chance that a petition for certiorari might be granted in this Court. Neither *Rooker* nor *Feldman* require such a result. This Court has often ruled that every litigant should have a full and fair opportunity to litigate his constitutional claims. *See Haring v. Prosise*, 462 U.S. 306 (1983). Certainly the remand in *Feldman* with instructions to consider Feldman's constitutional challenge to bar admission rules clearly implied that Feldman was entitled to a full and fair opportunity to litigate constitutional questions that might have been raised before the District of Columbia Court of Appeals.

If the federal constitutional claims were not given a full and fair hearing, they were not "inextricably intertwined" with the *McBryde* judgment so as to bar jurisdiction in the District Court as were certain claims in *Feldman*. Whether *Rooker* and *Feldman* stand for more than an application or *res judicata*, they cannot be read to prevent Plaintiffs from having a full and fair opportunity to litigate federal constitutional claims.

The District Court found that Plaintiffs had no hearing on their constitutional claims in the Supreme Court of Hawaii. This finding cannot be refuted. In fact, the State of Hawaii argued in this Court in its Memorandum to Dismiss Appeal in *McBryde:*

> "Oral argument was duly limited to the issues specified in the Order of June 18, 1973 . . . The *per curiam* affirmation of the Supreme Court does not mention, discuss or pass upon any Federal questions."[20]

In order to escape review in this Court in *McBryde,* the Attorney General of the State of Hawaii successfully argued that federal constitutional questions were not decided by the Supreme Court of Hawaii. Now, in order to obtain review, the Attorney General argues that the Supreme Court of Hawaii heard and decided these same federal constitutional issues. Such duplicity should not be rewarded by the granting of certiorari.

Petitioners argue that because Plaintiffs received four months from the Supreme Court of Hawaii to prepare their petition for rehearing, which petition was summarily denied with respect to Plaintiffs' constitutional claims, Plaintiffs have received due process from the Supreme Court of Hawaii and therefore cannot have any hearing on their federal claims in the United States District Court. Such an argument seems ludicrous and is contrary to any decisions of this Court. A refusal to grant a hearing is not the equivalent of a full and fair hearing on constitutional issues.

Plaintiffs never had a hearing until the United States District Court heard their case and upheld their federal

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20 Respondents' Appendix B, R.App. 11

rights against the unconstitutional claims of the State officials. The United States District Court had jurisdiction to hear such claims and was the only court willing to do so.

Due process requires a full and fair hearing by an unbiased tribunal. *See Gibson v. Berryhill*, 411 U.S. 564 (1973). Not only did the Supreme Court of Hawaii decide *sua sponte* that Hawaii's century old system of water law should be overturned, but the Chief Justice appeared as *amicus curiae* in the Court of Appeals urging reversal of the District Court's judgment. In spite of two motions requesting that he recuse himself, the Chief Justice wrote the opinion on the certified questions. The opinion held not only that *McBryde* was correctly decided and all inferior courts were bound to follow that decision but it even reiterated the argument in the Court of Appeals that the federal courts had no jurisdiction in this case. Under those conditions one could hardly expect an unbiased tribunal would hear Plaintiffs' federal constitutional claims in the courts of the State of Hawaii.

Even if refusal to grant a rehearing may be considered a hearing on the merits, the District Court had jurisdiction to hear the constitutional claims. Plaintiffs' constitutional claims were not fairly considered by the Supreme Court of Hawaii, and neither *res judicata*, collateral estoppel nor the "*Rooker* doctrine" should bar the hearing of those claims by the federal courts. The rule is clear with respect to collateral estoppel and logically to other forms of *res judicata*.

> "Moreover, additional exceptions to collateral estoppel may be warranted in Section 1983 actions in light of the "understanding of Section 1983" that "the federal courts could step in where the state courts

> were unable or unwilling to protect federal rights." [*Allen v. McCurry*, 449 U.S. at 96, 66 L.Ed. 308, 101 S.Ct. 411].
>
> *Haring v. Prosise*, 462 U.S. at 313-314.

As stated in *Allen v. McCurry*, 449 U.S. 90, 95 (1980):

> . . . "[O]ne general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case."

This Court reiterated in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982):

> "We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue."
>
> *Id.* at 480-81.

The District Court had jurisdiction to determine whether Plaintiffs had a full and fair hearing, and *Feldman* and *Rooker* cannot be read to deny the District Court's jurisdiction to determine whether or not such a hearing took place. The District Court correctly decided that no hearing occurred and decided Plaintiffs' constitutional claims.

III. The District Court Had Jurisdiction To Enter A Declaratory Judgment To Protect Plaintiffs' Adjudicated Ownership Of Water Rights.

The Court of Appeals held that more than a half century of litigation over the ownership of the surplus waters of the Hanapepe River was enough and that the case was ripe for entry of a declaratory judgment. Petitioners seize upon the Court of Appeals' decision to use the "less harsh

and abusive remedy'' of declaratory relief *(Stefel v. Thompson*, 415 U S. 452, 463 (1974)) rather than an injunction as grounds for claiming that there was no case or controversy.

The Court of Appeals' decision to lift the injunction was rendered seven years after the District Court judgment and was based on representations to the Court of Appeals by Petitioners after they had been enjoined that no action to enforce *McBryde* was contemplated. The Court of Appeals noted:

> ''the officers still argue, however, that the State is free under *McBryde* I and II to take any action it may see fit in the future to control the flow of the river.'' App. 13a

There was never any contention raised by Petitioners in the District Court nor in the Court of Appeals that there was no case or controversy.[21] In fact Petitioners consistently maintained that it was their duty to enforce the law as clearly enunciated by the Supreme Court of Hawaii and that the holdings in *McBryde* were *res judicata.* The issues presented for review on appeal to the Court of Appeals by Petitioners were (1) whether there was a denial of due process by the Supreme Court of Hawaii; (2) whether *McBride* was *res judicata* as to the plaintiffs' federal claims; and (3) whether the Eleventh Amendment barred this suit against state officials.[22]

In their memorandum to the Court of Appeals on what constituted the judgment in Hawaii for the purpose of *res judicata* after the first argument, Petitioners argued that Supreme Court's holding in *McBryde* was entitled

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21 Complaint, paragraph 13, App. 275a, Answer, App. 296a

22 Opening Brief, Issues Presented Respondents' Appendix C, R.App. 12-13

to *res judicata* treatment. Petitioners explained why there was no judgment on remand and why the Supreme Court's holdings were conclusive:

> "Perhaps the Supreme Court felt that a remand was not necessary in view of the clear and decisive language in the partial reversal which held that all surplus water was vested in the state, and the owners of ancient water rights could not transport water out of the Hanapepe Valley for use on kula or arid lands having no water rights.
>
> In any event, a second amended judgment would have been perfunctory and should not be the basis for the court to consider instant proceeding to be premature."[23]

As of the date of the memorandum in 1979, the Defendant state officials including the Attorney General were clear as to the holding of *McBryde*, to wit: (1) surplus water was vested in the state and (2) no water could be transferred out of the Hanapepe Valley.

Similarly, in 1981 the state officials reiterated that the *McBryde* judgment was enforceable by them. In their brief to the Supreme Court of Hawaii on the certified questions the State Officials maintained that "the Department of Land and Natural Resources . . . would enforce the ruling under *McBryde* to enjoin the diversion of water from the Hanapepe watershed."[24]

In their Reply Brief in the Supreme Court on the issue of their right to prohibit diversion of water by Plaintiffs, the State Officials maintained:

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[23] Respondents' Appendix D, R.App. 17

[24] Respondents' Appendix E, R.App. 18

> . . . . McBryde properly held that all surplus water was vested in the State of Hawaii. The state being the owner of all surplus water the right to divert thereof is moot.[25]

Again in its memorandum to the Court of Appeals after the Supreme Court of Hawaii's Answer to Certified Questions the state officials argued that *McBryde* resolved that: "All surplus water . . . was the property of the State of Hawaii and impressed with a public trust" and that the foregoing issue was 'final' . . . "[26]

In answer to the assertion that Plaintiffs' sugar lands would be damaged the state officials again magnanimously offered to sell Plaintiffs back their own water: Again with respect to Plaintiffs' vested rights awarded in *Gay II* the state officials reiterated that the case was a "nullity."[27]

There can be no doubt that the State Officials claim that Plainiffs have no vested interest in the surplus water of the Hanapepe River. There was no means for Plaintiffs to establish and protect these vested rights except by this action.

If this Court were to dismiss the case, State Officials could apply to the Fifth Circuit Court on the Island of Kauai to enforce the decision of *McBryde*. No federal constitutional claims would be heard because the Supreme Court of Hawaii has declared that those issues have already been foreclosed by *McBryde*.[28]

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25 Respondents' Appendix, F, R.App. 21

26 Respondents' Appendix G, R.App. 23-24

27 Respondents' Appendix G, R.App. 23-24

28 "*McBryde*, supra, thus precludes the bringing of any action in state court which would constitute an appeal of that case either by way of an original action or a motion for relief from judgment." 65 Hawaii 666, 658 P.2d at 305, App. 41a

Petitioners hold out the possibility that equitable defenses might be raised. To leave Plaintiffs to the tender mercies of the courts of Hawaii at some future date to determine if equitable theories will protect their vested constitutional rights, when the Supreme Court of Hawaii has itself refused and directed its inferior courts to refuse to hear any constitutional claims, is contrary to the letter and spirit of 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. 2201.

There is no valid reason for abstention in this case. No other action is pending. Dismissal of a federal suit for reasons of abstention or comity "naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973).

Declaratory judgment relief was proper even if an injunction was not.

> When no state proceeding is pending and thus considerations of equity, comity, and federalism have little vitality, the propriety of granting federal declaratory relief may properly be considered independently of a request for injunctive relief.
>
> *Stefel v. Thompson*, 415 U.S. at 462.
>
> . . .
>
> [E]ngrafting upon the Declaratory Judgment Act, a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment is considered would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate.
>
> *Id.* 415 U.S. at 471.

The continuing threat of the State Officials to enforce the *McBryde* holding and the claim by the State Officials that the State owns the surplus water of the Hanapepe River provided a case and controversy that was properly before the District Court and the Court of Appeals. This is not a case where state regulations have been enacted and their effect needs clarification by a state court. No laws or regulations have been adopted pertaining to the surplus water of the Hanapepe River. There has been a declaration by the Supreme Court of Hawaii in *McBryde* divesting Plaintiffs of their property rights. This ruling was reiterated by the Supreme Court of Hawaii in its answers to certified questions and explained more clearly in the companion case of *Reppun v. Board of Water Supply*, 65 Hawaii 531, 656 P.2d 57 (1982).[29]

To say that the State holds the water in public trust for its people is no defense to Plaintiffs' claim that their property has been taken without due process of law. The District Court did not erroneously conceive of water rights as similar to bushels of wheat as Petitioners indicate in citing *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906 (1983). In any event the *Nevada* case holds that water rights become vested and fixed by *res judicata* and it stands for the proposition that water rights are property and once determined should not be changed.

> "The policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water." 103 S.Ct. at 2918 n.10

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[29] In *Reppun* Chief Justice Richardson concludes that previous Hawaiian judges, induced by western concepts of property contrary to ancient Hawaiian custom, erroneously granted property rights in water. 65 Hawaii at 547-48.

Plaintiffs' property rights have been severely damaged and threatened by Petitioners who rely on the unconstitutional holdings of the Supreme Court of Hawaii to for their position. A clear case and controversy exists.

———o———

CONCLUSION

Petitioners' position is untenable on the merits. It is unlikely that a similar case will arise again and there is no compelling reason why this court should grant certiorari. The decision of the Court of Appeals is clearly correct on the facts and law and should be allowed to stand without further review.

Respectfully submitted,

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Selwyn A. Robinson, et al.

No. 85-406

In The

Supreme Court of the United States

October Term 1985

GEORGE R. ARIYOSHI, GOVERNOR,
STATE OF HAWAII, et al.,

Petitioners,

vs.

SELWYN A. ROBINSON, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' APPENDIX

TABLE OF CONTENTS

Page

Appendix A—Amended Judgment After Remand, filed in the U.S. District Court on September 24, 1985 ..... App. 1

Appendix B—State of Hawaii's Motion to Dismiss Appeal from the Supreme Court of Hawaii in Nos. 73-1440, 73-1441, 73-1442, filed in the Supreme Court of the United States, dated May 23, 1974 (excerpts) ..... App. 8

Appendix C—Opening Brief of State Officials, Defendants-Appellants, CA No. 78-2264 filed in the Court of Appeals for the Ninth Circuit dated August 29, 1978 (excerpts) ..... App. 12

Appendix D—State Officers Memorandum on the Documents Which Constitute the Judgment for Res Judicata Purposes under the Law of Hawaii, CA No. 78-2264 filed in the Court of Appeals for the Ninth Circuit dated September 21, 1979 ..... App. 14

Appendix E—Opening Brief of State Officials to Certified Questions from the United States Court of Appeals for the Ninth Circuit to the Supreme Court of Hawaii, No. 8241 filed in the Supreme Court of Hawaii dated July 30, 1981 (excerpts) ..... App. 18

Appendix F—Reply Brief of State Officials, No. 8241 filed in the Supreme Court of Hawaii dated January 27, 1982 (excerpts) ..... App. 21

Appendix G—Memorandum by Appellants on the Effect of Hawaii Supreme Court's Opinion of December, 1982, on the Instant Case and the Answers to the Certified Questions, CA No. 78-2264 filed in the Ninth Circuit Court of Appeals dated October 3, 1983 (excerpts) ..... App. 24

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 74-32

SELWYN A. ROBINSON, et al.,

Plaintiffs,

vs.

GEORGE R. ARIYOSHI, et al.,

Defendants.

AMENDED JUDGMENT AFTER REMAND

(Filed September 24, 1985)

AMENDED JUDGMENT AFTER REMAND

This is an action for declaratory judgment and injunctive relief.

Pursuant to the decision of the Court rendered October 26, 1977, and the decision of the United States Court of Appeals for the Ninth Circuit rendered February 20, 1985, 753 F.2d 1468, rehearing denied May 14, 1985,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The following definitions shall apply to this Judgment:

a. The phrase "defendant State Officials" refers to George R. Ariyoshi, Governor of the State of Hawaii, Corinne K.A. Watanabe, Attorney General, Andrew S.O. Lee, Deputy Attorney General, Susumu Ono, John Y. Arisumi, J. Douglas Ing, Moses W. Kealoha, Roland H. Higashi and Leonard H. Zalopany, Chairman and Members of the Board of Land and Natural Resources, as well as their

successors in office, agents, servants, employees and attorneys and those persons in active concert or participation with them who receive actual notice of this Judgment by personal service or otherwise.

b. The term "Small Owners" refers to defendants Ida Albarado, Helen B.H. Chu, Henry J. Chu, Chee Kung Fui Society, Lapaz Francisco, Marcellino Francisco, Albert K. Kaailau, Linda P. Kaiakapu, Ann N. Kali, Harriet U. Kano, Junichi Kano, Kiyoshi Kimata, Arnold W.F. Leong, Katherine A. Leong, Lo Sun D. Leong, Tai Hing Leong, Hanayo T. Naumu, Wallace A. Naumu, Hideo Nonaka, Hiromi Nonaka, Iwao Nonaka, Kazuo Nonaka, Masatoshi Monaka, Shigekichi Nonaka, Takano Nonaka and Takao Nonaka.

c. The term "normal surplus water" has the meaning given the term by *Territory v. Gay*, 31 Haw. 376 (1930), *aff'd* 52 F.2d 365 (9th Cir.), *cert. denied*, 284 U.S. 671 (1931) and refers to all surface waters, other than "storm and freshet surplus waters," which are not required for the satisfaction of "prescriptive rights" or "appurtenant rights", as defined under the law of Hawaii as it existed prior to *McBryde*.

d. "*McBryde*" refers to the decision of the Hawaii Supreme Court in *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330, *aff'd on rehearing*, 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed for want of jurisdiction and cert. denied*, 417 U.S. 962, 976 (1974), and any judgments or orders entered pursuant thereto.

e. The term "Hanapepe River" includes its tributaries, Manuahi and Koula.

2. Plaintiffs Robinson, et al., McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, and the Small Owners are entitled (a) to transport waters of the Hanapepe River in which they have water rights for use beyond the watershed of origin or for use on lands other than those giving rise to water rights, and (b) to transfer or reserve their water rights in the waters of the Hanapepe River by deed, lease, or other conveyance with or without a transfer of the lands to which the water rights relate. Under the laws of the State of Hawaii, the Plaintiffs' ownership of the rights to take normal surplus water, and the rights of Plaintiffs, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, and the Small Owners to take, transport and use all waters in which they have water rights are vested property rights, and are capable of sale, lease, transfer, reservation or other conveyance. Transferees of any such water rights, whether originally denominated as appurtenant, prescriptive or surplus waters, have the same rights as their transferors. Enforcement of the rulings in *McBryde* which are contrary to the declarations or provisions of this judgment would result in an unconstitutional taking of vested property rights of the Plaintiffs, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, and the Small Owners. The defendant State Officials, although they deny that they are presently planning to do so, have heretofore asserted the right and power on behalf of the State to seize, take, confiscate and appropriate the private water rights in the Hanapepe River from their rightful owners. Interference contrary to the declaratory provisions of this judgment by the defendant State Officials with the rights of Plaintiffs, McBryde Sugar Company, Limited, and Olokele Sugar

Company, Limited, to withdraw water from the Hanapepe River and to transport and use it would do substantial and irreparable injury and would be financially disastrous to them. Any interruption in their diversions would do immediate and irreparable damage. The Plaintiffs, McBryde Sugar Company, Limited, and the Small Owners have appurtenant water rights and have been using water in part on land to which the water rights are not appurtenant, and, if unable either to continue such use or to sell such water rights to owners of other land, they would be substantially and irreparably injured. It is impossible to ascertain precisely the extent of the economic injury which would result from interference by the defendant State Officials with such private water rights.

3. *McBryde* constitutes a cloud on the surface water rights of the private property owners, but because the defendant State Officials in these proceedings have taken no steps to interfere with, and have denied that they are presently planning to take steps to interfere with the property of the Plaintiffs, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, and the Small Owners, as declared above, an injunction against the defendant State Officials may be premature at this time. Thus, no injunctive relief will be granted at this time since the declaration of the rights of the parties herein would appear sufficient to protect the rights of the private parties. This Court retains continuing jurisdiction to enjoin the defendant State Officials from conduct in violation of the property rights declared above, including, *without limitation thereto*, any injunction necessary to prevent the defendant State Officials from:

a. Enforcing or attempting to enforce *McBryde* to the extent that it adjudicated (1) that Plaintiffs are not the owners of the water rights to the normal surplus waters of the Hanapepe River, (2) that Plaintiffs, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, and the Small Owners, to the extent of their water rights, may not transport waters from the Hanapepe River for use beyond the watershed of origin or for use on lands other than those giving rise to water rights, (3) that Plaintiffs, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, and the Small Owners, to the extent of their water rights, may not sell, lease, reserve or otherwise transfer such water rights together with, or severed from, any of the lands which originally gave rise to those water rights, (4) that any holder of reserved water rights, or transferee of water rights may not transport and use the waters covered by such reserved or transferred rights to the same extent as prior to the reservation or transfer, or (5) that a severance of water rights from the lands to which originally appurtenant results in a forefeiture of such rights.

b. Preventing or attempting to prevent the use by Plaintiffs or their lessee, Olokele Sugar Company, Limited, of the normal surplus waters of the Hanapepe River on the basis of *McBryde* or on the basis of a claim that Plaintiffs do not own or have water rights to the normal surplus waters of the Hanapepe River; or

c. Preventing or attempting to prevent Plaintiffs, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, or the Small Owners from transporting from the Hanapepe River waters in which they have water

rights for use beyond the watershed of origin or for use on lands other than those giving rise to water rights either on the basis of *McBryde* or on the basis of a claim that the water rights of said parties do not entitle them to utilize water beyond the watershed of origin or on lands other than those giving rise to water rights; or

d. Preventing or attempting to prevent the consumptive use by Plaintiffs, Olokele Sugar Company, Limited, McBryde Sugar Company, Limited, or the Small Owners, or any transferee of water rights from them, of their water rights under any claim that such water rights must be returned to Hanapepe River after use pursuant to the doctrine of riparian rights as newly declared in *McBryde*, or that any such use of their water rights is prohibited by *McBryde's* declaration that the Hanapepe River must flow "in the shape and size given it by nature".

4. Nothing herein shall prohibit the defendant State Officials from instituting eminent domain proceedings for the acquisition (upon payment of just compensation) of all or any part of Plaintiffs' water rights or the water rights of any other party to this proceeding.

5. Under the law of Hawaii existing prior to *McBryde*, it was clearly established that water rights may be acquired by prescriptive use and that downstream owners may acquire rights against an upstream owner, contrary to the riparian doctrine. Because, however, this Court is unable to positively conclude that a federal question is involved in the Counterclaim of McBryde Sugar Company, Limited, against the Plaintiffs for prescriptive water rights, said Counterclaim is dismissed without prejudice. Unless determined by agreement of the parties in interest, the ultimate determination, to be made in the light of the decisions rendered by this Court and the Ninth Circuit Court

of Appeals, of the prescriptive water rights of McBryde Sugar Company, Limited, and of the allocation of storm and freshet surplus waters, is left to the Hawaii Fifth Circuit Court sitting as statutory water commissioner and exercising the jurisdiction that was retained by the Amended Judgment in Special Proceeding No. 108, or to any other state court having jurisdiction thereof or of any appeal therefrom.

6. This Court hereby retains continuing jurisdiction in this case to hear and determine at any time hereafter any application which the parties may make with respect to this judgment and to take such action as may be necessary or appropriate to assure compliance with this judgment by the parties hereto and their successors.

DATED: Honolulu, Hawaii, Sept. 23, 1985.

/s/ MARTIN PENCE
United States District Judge

APPROVED AS TO FORM:

/s/ Alexander C. Marrack
Attorney for Selwyn A.
Robinson, et al.

/s/ J. Russell Cades
Attorney for McBryde
Sugar Company, Limited

/s/ Robert B. Bunn
Attorney for Ida Albarado, et al.

/s/ John J. Rapp
William F. Quinn
Attorneys for Olokele Sugar
Company, Limited

Corinne K. Watanabe
James Dannenberg
Attorneys for State Officials

APPENDIX B

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

Nos. 73-1440, 73-1441, 73-1442

McBRYDE SUGAR COMPANY, LIMITED, and
OLOKELE SUGAR COMPANY, LIMITED, *Appellants*,
vs.
STATE OF HAWAII, et al., *Appellees*.

SELWYN A. ROBINSON, et al., *Petitioners*,
vs.
STATE OF HAWAII, et al., *Respondents*.

IDA ALBARADO, et al., *Petitioners*,
vs.
STATE OF HAWAII, et al., *Respondents*.

On Appeal from the Supreme Court of the State of Hawaii
and Petitions for Writ of Certiorari to the
Supreme Court of the State of Hawaii

MOTION TO DISMISS APPEAL FROM THE
SUPREME COURT OF HAWAII

Appellee-Respondent, State of Hawaii, moves this Honorable Court to dismiss the appeal herein on the following grounds:

(1) The Federal questions sought to be reviewed were neither timely nor properly raised nor expressly passed on by the Courts of Hawaii.

(2) The appeal does not present a substantial Federal question.

STATEMENT

In 1959, the present suit was instituted by McBryde Sugar Company, Limited ("McBryde") pursuant to Part III, Chapter 664, Hawaii Revised Statutes, to adjudicate the ownership of all waters of the Hanapepe Valley basin.

At the hearing before the trial Court, appellants and petitioners did not raise any Federal Constitutional questions, and the trial Court, on December 10, 1968, made a determination of the water rights of the landowners.[1] Although the trial court noted that diversions of water had occurred, the Court did not reach the legality of such diversions.[2]

---

[1]All references to appendix made herein refers to "Joint Appendix to Jurisdictional Statement and Petitions for Writs of Certiorari" submitted on behalf of Appellants and Petitoners. Decision (App. 4); Conclusions of Law No. 13 (App. 55-57).

[2]Decision, Findings 11 and 15 (App. 7, 8-9); Finding 30 (App. 13).

Separate appeals to the Supreme Court of Hawaii were filed by McBryde, Gay & Robinson and the State of Hawaii, but no Federal Constitutional questions were presented.

* * *

On June 18, 1973, the Supreme Court of Hawaii entered an order directing McBryde, Gay & Robinson, the State of Hawaii and the Small Owners to file briefs limited to the issues as follows:[3]

"1. The pertinent portion of HRS § 7-1, which was first enacted on August 6, 1850, Laws 1850, and which has been in our statute books ever since, reads:

> 'The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use.'

Is the foregoing statute material to the determination of the water rights of the parties in this case? If so, why, if not, why?

2. The parties in this action introduced evidence as the record shows, to show that parcels of land in the Hanapepe Valley were entitled to appurtenant water rights for raising taro at the time of the Mahele or the Land Commission Award. The trial court found certain parcels were entitled to appurtenant water rights. Under what principle or theory of law are the owners en-

---

[3]Order of June 18, 1973 (App. 108-109).

> titled to apply the appurtenant water rights to parcels of land other than that to which the court found the right appurtenant?''

On June 29, 1973, Olokele was also ordered by the Court to file a brief directed to the same issues.

Oral argument was duly held limited to the issues specified in the order of June 18, 1973. On December 20, 1973, a *per curiam* affirmation of its prior opinion entered on January 10, 1973, was entered by a majority of the Supreme Court finding "no reason to change the decision filed herein."[4] The *per curiam* affirmation of the Supreme Court does not mention, discuss or pass upon any Federal questions.

QUESTIONS PRESENTED

1) Where federal constitutional questions are neither timely nor properly raised in proceedings to determine the rights of landowners to appurtenant, riparian, and surplus waters, and the Supreme Court of Hawaii does not pass on any federal question, does the jurisdiction of the United States Supreme Court attach on appeal from the state judgment?

2) Where the Supreme Court of Hawaii makes a determination of the rights of landowners to appurtenant, riparian and all surplus waters by construing for the first time a state statute and its decision is made upon a fair and

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[4]55 Haw. at 260 (App. 114).

substantial basis, does the jurisdiction of the Supreme Court of the United States attach on appeal from the state judgment?

3) Where a state statute involves the "rights of the people" to appurtenant, riparian and surplus waters, and the sole issue before the state courts is a determination of such water rights, is there a substantial federal constitutional question involved?

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA NO. 78-2264

SELWYN A. ROBINSON, et al.,

Plaintiffs-Appellees,

vs.

GEORGE R. ARIYOSHI, Governor, et al.,

Defendants-Appellants,

and

McBRYDE SUGAR COMPANY, LIMITED, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF HAWAII

OPENING BRIEF OF SATE OFFICIALS,
DEFENDANTS-APPELLANTS

ISSUES PRESENTED FOR REVIEW

Where issues not raised on appeal are ruled upon by the appellate court *sua sponte* and affirmed after briefs are filed and oral argument are had upon petition for rehearing:

1. Is there a denial of due process, equal protection and full faith and credit where the appellate court overrules prior laws on property?

2. Are the issues so decided barred from subsequent litigation in Federal court under the doctrine of res judicata?

3. Does the Eleventh Amendment bar subsequent actions against State Officials on said issues?

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA NO. 78-2264

SELWYN A. ROBINSON, et al.,

Plaintiffs-Appellees,

vs.

GEORGE R. ARIYOSHI, Governor, et al.,

Defendants-Appellants,

and

MCBRYDE SUGAR COMPANY, LIMITED, et al.,

Defendants-Appellees.

STATE OFFICERS MEMORANDUM ON THE DOCUMENTS WHICH CONSTITUTE THE JUDGMENT FOR RES JUDICATA PURPOSES UNDER THE LAW OF HAWAII

Upon conclusions of oral argument on September 4, 1979, the Court requested counsel to submit authorities on the above subject.

In the instant case, the Supreme Court of Hawaii in *McBryde v. Robinson* rendered its opinion on January 10, 1973, 54 Haw. 174. Petition for rehearing was granted. Briefs were duly filed, oral argument held and the Supreme Court by *per curiam* opinion dated December 20, 1973, affirmed its earlier decision. 55 Haw. 260.

Judgment on appeal in the Supreme Court of Hawaii was filed on December 28, 1973.

The instant case was filed in the Federal District Court on February 14, 1974, seeking to enjoin the State

Officers from enforcing the opinion of the State Supreme Court in *McBryde v. Robinson.*

Notice of Appeal to the Supreme Court of the United States was filed on February 25, 1974, and Petition for Writ of Certiorari was filed on the 19th day of March, 1974.

Certiorari was denied June 17, 1974, 417 U.S. 962.

From the foregoing, it can be readily seen that no judgment was entered by the Fifth Circuit Court since the opinion of the State Supreme Court. The last judgment entered by the Fifth Circuit Court or trial court was the Amended Judgment filed on the 30th day of January, 1969, which is the judgment that was the subject of appeal before the State Supreme Court.

To answer the question posed by this Court for application of the documents which constitute the judgment for res judicata purposes under the law of Hawaii, the authorities hold that the judgment or decree, together with any part of the prior record considered pertinent may be pleaded as the "judgment" for res judicata purposes.

Hapai v. Brown, 21 Haw. 756 (1913), involved an action to quiet title where the defendant claimed title to the whole land on the basis of a prior adjudication. In support thereof, defendant put in evidence certified copies of the record of the Supreme Court in the case entitled *Kahoiwai v. Paakuku,* including a certified copy of a Deed on which claim of title was based. The court said:

> "It is now too well settled, however, to admit a doubt that if upon a plea of *res judicata* the judgment relied upon as constituting the former adjudication does not of itself declare with certainty the precise scope of the matters adjudged, resort may be had, in aid

> of its interpretation in this respect, to the pleadings, the opinion of the trial court, the findings of fact and the testimony."

Similarly, *Carey v. Discount Corporation,* 37 Haw. 295 (1946), involved two cases consolidated by the Supreme Court for reason that both involved a plea in bar of res judicata, the pleading of defendant included:

> "The pleadings, decisions, judgments, record in the circuit and supreme courts, briefs and other writings on file in the circuit court in the law action and in the supreme court were incorporated in the plea of *res judicata.* Id. at 301.

The Supreme Court of Hawaii in discussing res judicata, like courts of other jurisdictions, refer to the judgment or decree in a prior litigation as constituting a bar to subsequent attempts to relitigate issues that were litigated or were not litigated but should have been raised between the same parties or their privities. *State v. Hawaiian Dredging Co.,* 48 Haw. 152, 165 (1964); *Bertelmann v. Lucas,* 35 Haw. 335, 342 (1940); *Glover v. Fong,* 42 Haw. 560 (1958); *Makainai v. Lalakea,* 29 Haw. 482 (1926).

It appears from a discussion of the above cases that although the judgment is the basis for a plea in bar of res judicata, the courts will consider not only the trial court's judgment or decree but also the records of the trial court and the opinion of the Supreme Court. Hence, in the instant case, although a second amended judgment was not entered by the State trial court after the State Supreme Court opinion, the opinion of the Supreme Court and the judgment on appeal in the Supreme Court may be considered for res judicata purposes.

Also, it is to be noted that the Supreme Court made the concluding statement, "affirmed in part; reversed in

part." The opinion did not contain language of remand to the lower court.

Perhaps the Supreme Court felt that a remand was not necessary in view of the clear and decisive language in the partial reversal which held that all surplus water was vested in the State, and that the owners of ancient water rights could not transport water out of Hanapepe Valley for use on kula or arid lands having no water rights.

In any event, a second amended judgment would have been perfunctory and should not be the basis for this Court to consider the instant proceeding to be premature.

DATED: Honolulu, Hawaii, September 21, 1979.

/s/ Andrew S. O. Lee
Deputy Attorney General
Attorney for State Officers

APPENDIX E

NO. 8241

IN THE SUPREME COURT OF THE
STATE OF HAWAII

OCTOBER TERM 1980

CERTIFIED QUESTIONS
from the
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT, 9th Circuit

No. 78-2264

SELWYN A. ROBINSON, et al.,

Appellees,

vs.

GEORGE R. ARIYOSHI, Governor, et al.,

Appellants,

and

McBRYDE SUGAR COMPANY, LIMITED, et al.,

Appellees.

OPENING BRIEF OF STATE OF HAWAII TO CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT TO THE SUPREME COURT OF HAWAII

ARGUMENT

Certified Question (1)

MAY ANY HAWAII STATE OFFICIAL EXECUTE ON THE JUDGMENT ENTERED IN *McBRYDE SUGAR CO. v. ROBINSON, SUPRA,* TO ENJOIN ROBINSON, McBRYDE, OLOKELE, OR THE SMALL OWNERS FROM DIVERTING WATER FROM THE HANAPEPE OR KOULA WATERSHEDS?

YES.

McBryde held that appurtenant water rights may be used only on lands in Hanapepe Valley where the right

originated and cannot be diverted outside the Valley to Kula lands or lands not having such appurtenant water rights. 54 Haw. 191.

The diversion of water from said lands to other lands was one of the principle issues in *Robinson v. Ariyoshi*, 441 F.Supp. 559, 561, 586 (D.C. Haw. 1977), where the lower court judge erroneously held that the State Officials were enjoined from interfering with the right of Gay and Robinson, McBryde and the other persons having water right interest in Hanapepe to divert water from Hanapepe Valley to lands outside of Hanapepe Valley.

The Department of Land and Natural Resources having the power of management, administration and control over public lands, and water resources under Chapter 171, Hawaii Revised Statutes, § 171-3, H.R.S., would enforce the ruling under *McBryde*.

Certified Question (2)

MAY THE STATE OF HAWAII CLAIM COLLATEAL ESTOPPEL OR BAR AND MERGER EFFECT FROM *McBRYDE SUGAR CO. v. ROBINSON, SUPRA*, IF THE STATE BRINGS AN ACTION EITHER TO QUIET TITLE TO THE WATER OF THE HANAPEPE OR TO ENJOIN THE DIVERSION OF WATER FROM THE HANAPEPE?

YES.

* * *

APPENDIX F

NO. 8241

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

CERTIFIED QUESTIONS
from the
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-2264

SELWYN A. ROBINSON, et al.,

Appellees,

vs.

GEORGE R. ARIYOSHI, Governor, et al.,

Appellants,

and

McBRIDE SUGAR COMPANY, LIMITED, et al.,

Appellees.

REPLY BRIEF OF STATE OFFICIALS

The differences of the arguments can be pinpointed to Question 2 and Question 6.

Question 2 reads: MAY THE STATE OF HAWAII CLAIM COLLATERAL ESTOPPEL OR BAR AND MERGER EFFECT FROM *McBRYDE SUGAR CO v. ROBINSON, SUPRA*,[1] IF THE STATE BRINGS AN ACTION EITHER TO QUIET TITLE TO THE WA-

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[1] *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 502 P.2d 330, aff'd on rehearing, 55 Haw. 260, 517 P.2d 26 (1973), appeal dismissed for want of jurisdiction and cert. denied, 417 U.S. 962 (1974).

TER OF THE HANAPEPE OR TO ENJOIN THE DIVERSION OF WATER FROM THE HANAPEPE?

Question 6 reads: UNTIL *McBRYDE, SUPRA* WAS DECIDED, HAD THE ISSUE OF WHO OWNED SURPLUS WATER BEEN A SETTLED QUESTION IN HAWAII LAW?

And, permeating the contentions is the effect of *Territory v. Gay,* 31 Haw. 376 (1930), aff'd 52 F.2d 356 (9th Cir.), cert. denied 284 U.S. 677 (1931) (Gay II).

* * *

In conclusion, the State officers contend that *Gay II* ruling that G & R was the owner of normal surplus water was a nullity for reasons that (1) no riparian water rights were determined; (2) no ancient appurtanant water rights were determined; and (3) the quantum of water constituting normal surplus was not determined. Until *McBryde,* the ownership of surplus water was not a settled question in Hawaii. *McBryde* properly held that all surplus water was vested in the State of Hawaii. The State being the owner of all surplus water, the right to divert thereof is moot.

The prohibition of diversion of ancient appurtenant water rights which were determined by the quantum of water necessary to cultivate ancient taro patches is consonate with the origin, use and measurement of water rights.

DATED: Honolulu, Hawaii, January 27, 1982.

/s/ Andrew S. O. Lee
Deputy Attorney General
Attorney for State Officials

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA. NO. 78-2264

D.C. NO. 74-0032
HAWAII; M.P.

SELWYN A. ROBINSON, et al.,

Plaintiffs-Appellees,

vs.

GEORGE R. ARIYOSHI, Governor, et al.,

Defendants-Appellants,

and

McBRIDE SUGAR COMPANY, LIMITED, et al.,

Defendants-Appellees.

MEMORANDUM BY APPELLANTS ON THE EFFECT OF HAWAII SUPREME COURT'S OPINION OF DECEMBER, 1982, ON THE INSTANT CASE AND THE ANSWERS TO THE CERTIFIED QUESTIONS

and

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McBryde resolved the issues on:

1. Which lands are ancient taro lands, hence, entitled to water to cultivate taro under the ancient Hawaiian culture. The findings by the trial court on this issue was affirmed in *McBryde.*

2. The duty of water to cultivate taro under the ancient method was 50,050 gallons of water per acre per day. *McBryde* affirmed the trial court on this issue.

3. All surplus water, including normal surplus water as well as storm and freshet surplus water, awarded to Gay and Robinson (G&R) (Appellee) by the trial court was reversed in *McBryde,* and all surplus water—normal daily surplus, storm and freshet surplus and appurtenant water awarded but not used, was the property of the State of Hawaii and impressed with a public trust.

4. Prescriptive water rights awarded to McBryde Sugar Company by the trial court sitting as a Water Commissioner was reversed in *McBryde* on the basis that since the State was the owner of all surplus water and the statute of limitation does not run against the State, prescriptive water rights became moot.

The Supreme Court's Answer held that preclusion would apply only to the issues that were decided by the court. The foregoing issues are final. There can be no confusion or misunderstanding on said issues by Appellees. Res judicata, collateral estoppel, merger and bar would preclude said issues in future litigation.

The Supreme Court's Answer clarified *McBryde* by stating that the prohibition against transport of water outside of the water shed of Hanapepe for use on lands not entitled to ancient appurtenant water rights was not

an absolute prohibition. The State understood this to be the rule in *McBryde*. Appellees, however, in an uproar, claimed that the prohibition was an absolute prohibition which would cause the destruction of sugar plantations which use such transported water. The State, after *McBryde,* in oral argument as well as in its several briefs contended that as the owner of the surplus water the State may sell such water to Appellees and use such water for the general benefit and welfare of the public. This is covered in Argument II. This argument concerning surplus water will also be covered under the subject of whether *McBryde* reversed settled law, Argument III.

McBryde did not determine who were riparian owners entitled to riparian water rights. This subject was left for future determination and none of the parties put on proof on this issue nor litigated this issue. Furthermore, *McBryde* did not decide at what point in diversion of water for non-taro use would subject the diverters to an injunction. No preclusion would apply to these issues.

* * *

surplus water to water non-tarro land, should have preclusive effect on the State.

Territory vs. Gay has been fully discussed, briefed and argued. The State contends, inter alia, that the case is a nullity since there is no distinction among normal surplus water, storm and freshet water and water allotted but not used. The federal district court when confronted with this question remanded the question of identification of storm and freshet water to the trial court or water commission and overruled *McBryde* by awarding normal surplus water to G&R without defining or quantifying such water.

* * *